SC92663

IN THE SUPREME COURT OF MISSOURI

PF GOLF, LLC,

Respondent (Petitioner below),

vs.

DIRECTOR OF REVENUE,

Appellant (Respondent below).

From the Administrative Hearing Commission of Missouri,
The Honorable Sreenivasa Rao Dandamudi, Commissioner

REPLY BRIEF OF APPELLANT DIRECTOR OF REVENUE

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SUMMARY OF THE ARGUMENT

The "mischief" predicted by Judge Wolff and Judge Stith – "tax avoidance in fee-for-use or rental situations" – has come to pass in this case. *Six Flags Theme Parks, Inc. v. Dir. of Revenue*, 102 S.W.3d 526, 533 (Mo. banc 2003) (J. Wolff & J. Stith, concurring and dissenting in part). PF Golf attempts to avoid its obvious tax problem by suggesting that the "rental" of golf carts is not actually mandatory. After all, PF Golf argues, 4 golfers out of 20,000 (which is .02%) were given an "accommodation" because they wanted to walk the course and not pay the mandatory fee for a golf cart.

Even the Administrative Hearing Commission concluded that the "rental" of golf carts in this case was mandatory, and the undisputed evidence supports this same conclusion. Indeed, the very witness that identified those 4 fabled golfers actually testified that he "could not tell you what happened in the four instances that [he] was told someone wanted to walk." (Tr. 77:16-78:6). The supposed "accommodation" was never explained.

Unable to avoid the actual facts, PF Golf argues that a ruling should only be prospective in this case as the Director's assessments were unexpected. *See* § 143.903.2 (2012 Cum. Supp.)[1/] Yet, it is clear that the

[1/] All references to the Missouri Revised Statutes are to the 2012 Cumulative Supplement unless otherwise specified.

authority cited by PF Golf does not establish that the Director's assessments were unexpected, but instead that the question had simply not been directly answered. The Director has regularly taken the position that in places of amusement additional fees are subject to tax as well as fees that are mandatory. This is neither a surprise nor unexpected.

ARGUMENT

I. The Sale of a Round of Golf That Includes a Mandatory Golf Cart Fee is Subject to Tax and is Not a Separate "Rental."

The Administrative Hearing Commission ("Commission") itself found that "the price of a round of golf . . . includes a mandatory golf cart rental in this case." (LF 93) (emphasis added). And although PF Golf attempts to obfuscate this point by claiming this fact is "patently false," Respondent's Brief, p. 20, the undisputed evidence supports this finding:

> Exhibit F – Official PF Golf listing of a single price, "walk or ride."
>
> Exhibit G – Official PF Golf listing of a single price, "walk or ride."
>
> Exhibit H – Official PF Golf answer to frequently asked questions concerning whether you can walk the course – "Yes, you can walk any time for the same fee."

Not surprisingly, PF Golf makes no reference or response to this undisputed evidence, nor to the Commission's finding that the price of a round of golf includes a mandatory golf cart rental – or more accurately a "fee." And the fact that 4 golfers out of 20,000 were somehow able to avoid

paying full price for a golf cart does not undermine the Commission's conclusion that the use and payment for a golf cart is mandatory.[2/] Indeed, the person who testified to this was even more equivocal when pressed for the details – he called it "an accommodation" and did not actually know what happened in those 4 instances:

> Q: Right. So, if a golfer comes in and says, "I want to walk the course," I think you said on direct that they would then subtract the twenty-two fifty; is that correct?
>
> A: I said that an accommodation would be made. I said in an instance that I can, that I know of, I was told of, the twenty-two fifty was subtracted.
>
> Q: So, it's not always the full amount of the golf cart that is subtracted then?

[2/] Likewise, the fact that competitive high school, college, and professional tournaments do not pay for golf carts does not undermine the undisputed evidence in this case, since those tournaments are priced in an entirely different way and by rule do not allow for the use of golf carts. *See* Ex. F; Ex. G; Ex I.

A: I wouldn't establish that fee. It would be established onsite. What I said, an accommodation would be made.

Q: So, but you don't know what that actual dollar amount would be?

A: I could not tell you what happened in the four instances that I was told someone wanted to walk.

(Tr. 77:16-78:6) (emphasis added). Because the undisputed facts establish a mandatory fee for a golf cart, the only issue in this case is what is the meaning of this fact in view of the statutory language and caselaw. In short, the mandatory fee is part of the overall cost of a round of golf at a place of amusement, and is, therefore, subject to tax.

In its decision the Commission felt constrained by this Court's holding in *Westwood Country Club v. Dir. of Revenue*, 6 S.W.3d 885 (Mo. banc 1999), but the Commission nevertheless correctly concluded that *Westwood* does not make a "distinction between mandatory and non-mandatory golf cart rentals." (LF 87). That is the point – *Westwood* does not address an issue in which the supposed "rental" is actually mandatory. And it is this kind of "mischief" that led Judge Wolff to call for the overruling of *Westwood*, a decision that he himself had authored. *Six Flags Theme Parks, Inc. v. Dir. of*

Revenue, 102 S.W.3d 526, 533 (Mo. banc 2003) (J. Wolff & J. Stith, concurring and dissenting in part) ("This unfortunately opens up many possibilities for tax avoidance in fee-for-use or rental situations—which also are not excepted by the statute. *Westwood* should be overruled on this point.").

The concept or notion of a "rental" suggests choice, particularly when combined with some other service or product that can be accomplished without the rental (*i.e.* a round of golf). If such a service or product comes with the "rental" of tangible personal property, but the "rental" is actually mandatory, then it is not truly a "rental," but instead part of the total cost for the service or product. The position of PF Golf in this case is reminiscent of the argument made by the taxpayer in *Brinker Missouri, Inc. v. Dir. of Revenue*, 319 S.W.3d 433 (Mo. banc 2010). In that case, the taxpayer argued that they "temporarily sold" plates, silverware, tables, and chairs to their patrons. *Id.* at 438-39. This Court easily saw through that sham and concluded that the use of plates, silverware, tables, and chairs was not a temporary sale but part of the overall cost of the service or product subject to tax. *Id.* at 440. The "rental" of golf carts is no less a sham in this case, and should likewise be subject to tax.[3/]

[3/] PF Golf argues that it is not actually trying to avoid the collection of taxes, and that there is "utterly no evidence to support such an accusation."

In support of their argument, PF Golf cites to the two *Six Flags* cases that followed *Westwood*. Respondent's Brief, p. 12 (citing *Six Flags Theme Parks, Inc. v. Dir. of Revenue*, 102 S.W.3d 526 (Mo. banc 2003) ("*Six Flags I*"); *Six Flags Theme Parks, Inc. v. Dir. of Revenue*, 179 S.W.3d 266 (Mo. banc 2005) ("*Six Flags II*")). But these cases do not support PF Golf's argument; instead, the cases support the Director. In *Six Flags I*, the patrons had the choice to play video games and pay separately for such use. *Six Flags I*, 102 S.W.3d at 529. It was certainly not mandatory nor part of the overall cost of the amusement park. The case would have been different had the amusement park simply charged everyone for the use of the video games (like roller coasters) – even if the park had itemized that supposed "rental" on their amusement park receipt.

The decision in *Six Flags II*, is even more compelling in support of the Director's argument in this case. In *Six Flags II*, there were inner tubes that were free and others that were rentals. *Six Flags II*, 179 S.W.3d at 267. Not

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Respondent's Brief, p. 19. Yet, in their official publications – noting that there is one price to "walk or ride" – PF Golf states (with bold in the original): "The above rates are applicable to daily fee play and include your cart and **do not include tax.**" Ex. F (bolded in original); Ex. G (bolded in original); Exhibit I (not bolded in original).

surprisingly, there was no argument that the inner tubes that came free – or were included in the price of admission – were not excluded from tax since they were just part of the overall cost of the park and were required for rides. Under PF Golf's theory, however, had Six Flags simply itemized the cost of the free inner tubes on receipts they might have avoided tax on those supposed "rentals." There were also additional inner tubes in *Six Flags II* that could be rented for special use, but they were not mandatory. *Id.* Patrons could use the free inner tubes or go without an inner tube in all situations. *Id.* Had the rental inner tubes in *Six Flags II* been truly mandatory and charged to all patrons, undoubtedly the result would have been different.

Finally, PF Golf attempts to distinguish this Court's decision in *Southern Red-E-Mix Co. v. Dir. of Revenue, State of Missouri*, 894 S.W.2d 164 (Mo. banc 1995). The Director, of course, recognizes that *Southern Red-E-Mix* involves the purchase and delivery of concrete and not golf carts. But the principle of *Southern Red-E-Mix* is both applicable and compelling. The principle is this: if the parties intended for the charges to be mandatory as a part of a larger sale, then the charges were not something that could be separated and excluded from taxes. *Id.* at 166-67. Such is the case here, and the supposed "rental" of golf carts at PF Golf is merely part of the total cost for the place of amusement.

II. The Director's Decision was Not Unexpected as the Caselaw and Regulations are Limited to Non-Mandatory Rentals, While the Director Has Routinely Distinguished Between Mandatory and Non-Mandatory Fees.

In the alternative, PF Golf argues that this Court's ruling on the exclusion at issue should be prospective so that it is not subject to payment for taxes it failed to pay. Respondent's Brief, p. 25-33 (citing § 32.053 & § 143.903). To support this argument, PF Golf suggests that the Director's assessment of taxes was unexpected because the statutes, caselaw, and letter rulings do not distinguish between mandatory and non-mandatory fees. The Commission noted this point as well – that PF Golf "relied on *Westwood Country Club v. Dir. of Revenue*, § 144.020.1(8), 12 CSR 10-108.700, and Letter Ruling LR 1349, which do not make a distinction between mandatory and non-mandatory golf cart rentals." (LF 87). Once again, that is the very point. Each of those circumstances did not involve mandatory fees.

A decision is "unexpected" if "a reasonable person would not have expected the decision or order based on prior law, previous policy or regulation of the department of revenue." § 143.903.2. Reliance on *Westwood* in this case for an unexpected decision is misplaced given the clear difference between mandatory and non-mandatory fees for the use of golf carts. Reliance is all the more precarious when one considers that two judges have

called for the overruling of *Westwood* based essentially on the predicted "mischief" that *Westwood* "opens up . . . for tax avoidance in fee-for-use or rental situations." *Six Flags I*, 102 S.W.3d at 533. That prediction is realized in this case, and its eventuality should not be characterized as unexpected. Reliance on § 144.020.1(8), 12 CSR 10-108.700, and Letter Ruling LR 1349 on this point is similarly misplaced.

As set forth in the Director's opening brief, the plain language of § 144.020.1 provides that PF Golf's total fees for rounds of golf are subject to tax under subdivision (2) as "entertainment or recreation, games and athletic events," instead of partially excluded as rentals under subdivision (8). Case law, the agency's regulation and letter ruling, and the surrounding provisions of the statute support this same conclusion.

Moreover, the Director has repeatedly recognized that mandatory fees are subject to sales tax in many contexts. In a 2007 Letter Ruling LR 4080, for example, the Director concluded that for purposes of "any place of amusement, entertainment or recreation, games and athletic events" a facility fee "whether Applicant separately states it or not, is a mandatory fee 'paid to, or in any place of amusement.' Therefore, the facility fee is subject to sales tax under Section 144.020.1(2)." In Letter Ruling LR 7051, the Director ruled that mandatory license fees for gaming machines were subject to sales tax. Similarly, in Letter Ruling LR 6878, the Director ruled that delivery

charges that are effectively mandatory are subject to sales tax. As such, the assessments in this case were not unexpected.

PF Golf further points out that the Director issued a proposed rule – of which PF Golf admits it did not know (Respondent's Brief, p. 26) – that would have clarified that including a mandatory fee for a golf cart is subject to tax. Far from establishing that the position is unexpected, the fact that the proposed rule was issued suggests that the Director believed that the proposed rule was authorized as an "agency statement of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure, or practice requirements of any agency." § 536.010(6). Indeed, a rule will not be sustained by a court if it is "unreasonable and plainly inconsistent" with the statute. *Foremost-McKesson, Inc. v. Davis,* 488 S.W.2d 193, 197–98 (Mo. banc 1972). It is also improper and impossible to draw an inference from the fact that the proposed rule was not adopted. Indeed, it is as likely that it was not adopted because the Director believed it was not necessary as it is for any other reason.

If the Director's assessments were somehow unexpected in this case, despite the Director's repeated arguments to the contrary concerning fees at places of amusement and mandatory fees, the decision should still be prospective only from the time that the Director issued the assessments in this case. § 32.053.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Director of Revenue's opening brief, this Court should reverse the decision of the Administrative Hearing Commission in favor of the Director of Revenue and against PF Golf, LLC.

Respectfully submitted,

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CERTIFICATION OF SERVICE AND COMPLIANCE

I hereby certify that on this 21st day of February, 2013, the foregoing brief was filed electronically via Missouri CaseNet and served electronically to:

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I further certify that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 2,627 words.

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